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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, Individually and in Her Capacity As Representative of JAMES EARL GREEN, Deceased, et al.,

Petitioners,

vs.

WILLIAM L. WALLER, Individually and As Governor of the State of Mississippi, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SEPARATE BRIEF FOR RESPONDENTS, CITY OF JACKSON AND ITS EMPLOYEES IN OPPOSITION

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This brief in opposition to the Petition for a Writ of Certiorari herein is filed on behalf of the Respondents, City of Jackson, Mississippi; Warren Magee, a Lieutenant of Jackson Police Department and Billy Dwight Till, Robert Gibson Austin, David Carl Penson, Wayne L. Simpson, Jr., and Billy Hinton Rowzee, police officers of the City of Jackson.

OPINION BELOW

A copy of the opinion delivered in the court below is attached to the petition herein as Appendix C.

JURISDICTION

These Respondents do not question the jurisdiction of this Court.

QUESTIONS PRESENTED

The statement by Petitioners as to the questions presented is inaccurate and misleading, insofar as these Respondents are concerned. As to them, the questions are:

1. Whether a jury verdict exonerating from liability, the 5 above named police officers of the City of Jackson whose only complained of act on the occasion in question was the firing of their weapons almost straight into the air, in accordance with their training in riot control, is to be overturned by this court.

2. Whether a jury verdict in favor of Police Lieutenant Warren Magee, a supervisory officer in charge of the combined detail of police officers and highway patrolmen, is to be set aside by this court, when the only complained of acts by him, on the occasion in question, is that he did not advise the highway patrolmen of the riot control procedures of the City Police and was not familiar with the Highway Patrol riot control procedures.

3. Whether a jury verdict in favor of the City of Jackson is to be set aside by this court, when the only charge against it is that, on the occasion in question, it was the employer of Lieutenant Magee and the 5 named police officers; and that the highway patrolmen became its borrowed servants.

STATEMENT OF THE CASE

Petitioners' statement of the case (Brief pages 8-20) as applied to these Respondents, is inaccurate, misleading, unfair and prejudicial.

1. The 5 police officers.

There is not a syllable of testimony in the record to suggest:

(a) That any one of the 5 Jackson police officers "panned" the crowded women's dormitory by raking it with gun fire, or that they fired their weapons in any manner, except into the air.

(b) That the training of these 5 police officers was contrary to any generally accepted standard, or that the firing of their weapons almost straight into the air, was not an accepted procedure in riot control.

On the contrary, the undisputed evidence shows:

> "Only five JPD policemen fired their weapons. They discharged their shotguns into the air at an angle of about 85 or 90 degrees, firing a total of seven rounds of number 1 buckshot." (Opinion page 1270)
>
> * * *
>
> "At the threshold, there was no error in denying the motions for directed verdicts against the five JPD officers who fired. Under the undisputed evidence all of them shot into the air at an angle approaching 90 degrees. A jury could find that their action was an acceptable procedure for meeting a riot situation without undue risk of harm to persons at the scene and that they were guilty of no tortious conduct." (Opinion page 1281)

And, on the trial of the case, petitioners admitted that this was a jury question. Thus, Mr. Mullen, one of their attorneys, said:

> "* * * There isn't any testimony that any defendant fired to suppress a riot, that I know of in the case, and if there is any such testimony it relates only to the firing by the Jackson Police Officers in the air. NOW, I will concede that it is possible for the jury to find that they were following their riot control instructions when they fired into the air and from the testimony that's in the record, I understand that firing into the air is a crowd control rather than an anti-sniper measure. So, with respect to those officers I think the instruction might properly be given as to whether they were negligent in firing without actually hearing an order to fire, but with respect to everyone else, their testimony is that they were firing at something. * * *" (T. p. 3276)

2. Lieutenant Magee

> "All supervisory officers on the scene are claimed to have failed to perform various command functions: Lt. Magee (in charge of the detachment), failure to inform all officers to load and fire only upon command, failure to be familiar with MHP procedures on crowd control; * * *
>
> All of these alleged failures raised jury questions and could not be the basis for directed verdicts." (Opinion pages 1284-1285)

3. The City of Jackson

In addition to immunity (Opinion pp. 1273-1274) all disputed factual issues were resolved against petitioners by the jury's verdict.

ARGUMENT

We think it is thoroughly well settled that in determining the liability, vel non, of these Respondents, generally accepted principles of tort law are controlling; both as to the civil rights claim under Section 1983, and as to the pendent claim under State law. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492; *Pierson* v. *Ray*, 386 U.S. 547, 18 L.Ed.2d 288; *Nesmith* v. *Alford*, 318 F.2d 110 (5th Circuit); *Whire* v. *Kern*, 407 F.2d 781 (5th Circuit); *Anderson* v. *Nosser*, 438 F.2d 183 (5th Circuit); *Anderson* v. *Nosser*, 456 F.2d 835 (5th Circuit); *Roberts* v. *Williams*, 456 F.2d 819 (5th Circuit).

The trial Judge properly instructed the jury:

1. As to the 5 police officers who fired, that the highest degree of care is imposed upon persons handling firearms, and as law enforcement officers, they are held to a higher degree of care than are ordinary citizens; that in determining the standard of care to be exercised by them on the occasion in question, the jury should consider the evidence respecting their training rules, their regulations and procedures for crowd and riot control, as well as the expert testimony as to what are proper riot and crowd control procedures in a situation such as existed on the occasion in question; all of which should be considered by the jury in determining whether, or not, the firing was negligent or wrongful. (T. pp. 3198-99)

Being properly instructed as to the applicable law, the jury returned its general verdict for these Respondents.

2. As to Lieutenant Magee, that if they found him to be under the duty to instruct the highway patrolmen in his combined detail, as to the training, rules and regula-

tions of the Jackson Police Department, and had a reasonable opportunity to do so, but failed so to do, and by reason thereof the petitioners were harmed, then he was liable. (T. p. 3210)

Being so properly instructed as to the law, the jury returned its general verdict in favor of Lt. Magee.

3. The trial Judge having reserved the question of immunity of the City of Jackson, submitted to the jury the issue of its liability, on full and accurate instructions as to the doctrine of Respondeat Superior, and as to the elements necessary to make the highway patrolmen the borrowed servants of the City. (T. pp. 3213-3216, 3303-3304) *Mississippi Export Railroad* v. *Temple*, 257 So.2d 187 (Miss.); *Rodicker* v. *Railroad*, 236 So.2d 414 (Miss.); *St. Louis-San Francisco Railroad* v. *Porter*, 211 So.2d 530 (Miss.); *Standard Oil Company* v. *Anderson*, 212 U.S. 215, 53 L.Ed. 480; *Shenker* v. *B & O Railroad Company*, 374 U.S. 1, 10 L.Ed.2d 709.

Being so properly instructed as to the law, the jury returned its general verdict in favor of the City.

On motion of petitioners for Judgment Non Obstante Veredicto, the trial judge decided the reserved question of immunity and ruled that under the Civil Rights Act the City was immune from suit, it not being a person within the meaning of the Act; and under State law, it was also immune from suit because on the occasion in question it was performing a governmental function. That such ruling is correct cannot be subject to serious debate. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492; *City of Kenosha* v. *Bruneau*, 412 U.S. 507, 37 L.Ed.2d 109; *Anderson* v. *Vanderslice*, 240 Miss. 55, 126 So.2d 522; *Twiner* v. *Jenkins*, 257 So.2d 488; *Simpson* v. *Poindexter*, 241 Miss. 854, 133 So.2d 286; *City of Hattiesburg* v. *Buckalew*, 240

Miss. 323, 127 So.2d 428; *Bates* v. *City of McComb,* 181 Miss. 336, 179 So. 737.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the Writ prayed by them should be granted. Certainly, as to these Respondents the decision below did not involve important questions of Federal law which have not been, but which should be settled by this court; nor does it decide federal questions in conflict with applicable decisions of this court or of any other Court of Appeals. On the contrary, it involves principles of tort law which have been well established for many years.

The petition should be denied.

Respectfully submitted,

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